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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

8 MICHAEL ERWINE,
9 Plaintiff
10 vs

Case No.: 3:18-cv-00461-RCJ WGC

11 CHURCHILL COUNTY, a political
12 subdivision of the State of Nevada,
13 CHURCHILL COUNTY SHERIFF
BENJAMIN TROTTER, and DOES 1
through 10 inclusive;

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

(WITH AUTHORITY)

Defendants.

1

1 To help you follow the evidence, I will give you a brief summary of the positions
2 of the parties:

3 The plaintiff asserts that the Defendants violated his liberty interest due process
4 rights under the Nevada and US Constitutions, for tortious constructive discharge,
5 defamation, defamation per se, and intentional interference with prospective
6 employment. The plaintiff has the burden of proving these claims.

7 The defendant denies those claims. The defendant has the burden of proof on
8 these counterclaims and/or affirmative defenses.

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28 Jury Instruction No. ____

NCJI 1.5

1 You should decide the case as to each defendant separately. Unless otherwise
2 stated, the instructions apply to all parties.
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Under the Fourteenth Amendment to the Constitution, a public employee has a right protected by the Due Process clause to engage in the common occupations of life. Plaintiff Erwine alleges that Benjamin Trotter and Churchill County deprived him of a liberty interest without due process in violation of the Fourteenth Amendment to the Constitution when Defendant Trotter made stigmatizing statements about Plaintiff Erwine in connection with firing him from Churchill County without notice, a hearing, and an opportunity to contest the charges.

In order to prove Churchill County and Defendant Trotter deprived Plaintiff Erwine of his Fourteenth Amendment right, Plaintiff Erwine must prove the following elements by a preponderance of the evidence:

1. Defendant Trotter terminated Plaintiff Erwine's employment;
2. Defendant Trotter published statements in connection with Plaintiff Erwine's termination that:
 - a. Impaired Plaintiff Erwine's reputation for honesty or morality, or
 - b. Effectively excluded, or caused a prolonged interruption of, Plaintiff Erwine's employment in the law enforcement field.
3. Plaintiff Erwine contests the accuracy of Defendant Trotter's statements; and
4. Defendant Trotter and Churchill County did not provide Plaintiff Erwine with an opportunity for a hearing to clear his name before publishing the statements.

In order to establish that the acts of Benjamin Trotter deprived Plaintiff Erwine of a liberty interest without due process, Plaintiff Erwine must prove by a preponderance of the evidence that defendant Trotter's statements were so closely related to Plaintiff Erwine's effective exclusion from his profession as to be the moving force that caused the ultimate injury.

If you find that Plaintiff Erwine has proven each of these elements by a preponderance of the evidence, you should enter a verdict for Plaintiff Erwine against both Defendants Trotter and Churchill County on this claim. If you find that Plaintiff

1 Erwine has not proven each of these elements by a preponderance of the evidence,
2 your verdict should be for the Defendants on this claim.
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Source: *Board of Regents v. Roth*, 408 U.S. 564, 573, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972), *Cox v. Roskelley*, 359 F.3d 1105 (9th Cir. 2004), *Tibbetts v. Kulongoski*, 567 F.3d 529, 535-37 (9th Cir. 2009); *Blantz v. Cal. Dept. of Corr. and Rehab.*, 727 F.3d 917, 925 (9th Cir. 2013); *Brady v. Gebbie*, 859 F.2d 1543, 1552 (9th Cir. 1988); *Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 777 & n.5 (9th Cir. 1982); Ninth

Jury Instruction No. ____
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1 Article 1 Section 8(5) of the Nevada Constitution provides that no person shall
2 be deprived of life, liberty, or property without due process of law. Under the Nevada
3 Constitution, a public employee has a liberty interest right protected by the Due
4 Process clause to engage in the common occupations of life.

5 A violation of the Nevada Due Process Clause occurs when a state actor
6 deprives a person of a right granted by the state without due process of law. In order
7 to prove Churchill County and Defendant Trotter deprived Plaintiff Erwine of his due
8 process rights under the Nevada Constitution, Plaintiff Erwine must prove:

- 9 1. Defendant Trotter terminated Plaintiff Erwine's employment;
- 10 2. Defendant Trotter published statements in connection with Plaintiff Erwine's
termination that:
 - 12 a. Impaired Plaintiff Erwine's reputation for honesty or morality, or
 - 13 b. Effectively excluded, or caused a prolonged interruption of, Plaintiff Erwine's
employment in the law enforcement field.
- 15 3. Plaintiff Erwine contests the accuracy of Defendant Trotter's statements; and
- 16 4. Defendant Trotter and Churchill County did not provide Plaintiff Erwine with
an opportunity for a hearing to clear his name before publishing the statements.

18 If you find that Plaintiff Erwine has proven each of these elements by a
19 preponderance of the evidence, you should enter a verdict for Plaintiff Erwine against
20 both Defendants Trotter and Churchill County on this claim. If you find that Plaintiff
21 Erwine has not proven each of these elements by a preponderance of the evidence,
22 your verdict should be for the Defendants on this claim.

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Jury Instruction No. ____

Summers v. Warden of Nev. State Prison, 84 Nev. 326, 329, 440 P.2d 388, 390 (1968). *McCracken v. Elko County Sch. Dist.*, 103 Nev. 655, 747 P.2d 1373 (1987). *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 133 Nev. Adv. Rep. 5, 388 P.3d 970, 971 (Nev. 2017).

1 Churchill County is a local government, and as such, can act only through its
2 agents, officers, and employees. Churchill County is responsible for harm caused by
3 the wrongful conduct of its agents, officers, and employees, if that conduct is within
4 the scope of the agents', officers', or employees' actual or apparent authority or
5 employment.

6 An agent has only that authority which has been given to him by the principal.
7 A principal is not liable for those acts of its agents, officers, or employees as to third
8 parties who know or who reasonably should know that the agent, officer, or
9 employee is acting outside the scope of his authority.

10 The principal, however, is bound by those acts of the agent, which are within
11 the actual or apparent scope of his authority, even if the agent, officer, or employee
12 is acting for his own motives and without benefit to his principal.

1 A communication is defamatory if it tends to harm the reputation of the plaintiff
2 as to lower him in the estimation of the community or to deter third persons from
3 associating or dealing with him. Words or conduct or the combination of words and
4 conduct can communicate defamation.

5 Defamation occurs when:

- 6 1. Defendant made a false and defamatory statement concerning plaintiff;
7 2. An unprivileged publication of the statement was made to a third person;
8 3. Defendant was at least negligent in making the statement; and
9 4. Plaintiff sustained actual damages as a result of the statement.

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1 Erwine seeks to recover damages based upon a claim of trade libel.

2 In order for you to find for plaintiff you must find that:

- 3 1. Sheriff Trotter and Churchill County published a statement about
4 plaintiff's goods, services, business, or professional ability;
- 5 2. The statement was one that would tend to disparage the title or quality
6 of plaintiff's goods, services, business, or professional ability;
- 7 3. The statement was false; and
- 8 4. Sheriff Trotter and Churchill County was at least negligent in making the
9 statement.

10 If you find for plaintiff, and you find that defendant's statements injured plaintiff's
11 business or profession, plaintiff is entitled to an award of presumed damages in an
12 amount reasonably calculated to compensate him for injury to reputation, loss of
13 business, shame, mortification, hurt feelings, and any consequential physical illness
14 or pain. Damages are to be presumed because it is impossible to affix an exact
15 monetary amount to these injuries.

1 In order to establish a claim for tortious constructive discharge, Erwine must
2 prove each of the following elements:

- 3 1. Erwine's resignation was induced by an action and conditions that violate
4 public policy;
- 5 2. A reasonable person in Erwine's position at the time of the resignation
6 would have also resigned because of the aggravated and intolerable employment
7 action and conditions;
- 8 3. Churchill County and Sheriff Trotter had actual or constructive
9 knowledge of the intolerable actions and conditions and their impact on Erwine; and
- 10 4. The situation could have been remedied.

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1 It is the duty of the Court to instruct you about the measure of damages. By
2 instructing you on damages, the Court does not mean to suggest for which party your
3 verdict should be rendered.

4 If you find for the plaintiff on the plaintiff's claims, you must determine the
5 plaintiff's damages. The plaintiff has the burden of proving damages by a
6 preponderance of the evidence. Damages means the amount of money that will
7 reasonably and fairly compensate the plaintiff for any injury you find was caused by
8 the defendant. You should consider the following:

9 *The reasonable value of the damage to the Plaintiff's reputation;*

10 *The reasonable value of wages and employment opportunities lost up to the
11 present time;*

12 *The reasonable value of wages and employment opportunities that with
13 reasonable probability will be lost in the future;*

14 *The emotional pain and suffering experienced;*

15 *It is for you to determine what damages, if any, have been proved.*

16 Your award must be based upon evidence and not upon speculation,
17 guesswork or conjecture.

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28 Jury Instruction No. ____

NCJI 5.1

1 Any award for future economic damages must be for the present cash value of
2 those damages.

3 Noneconomic damages such as emotional distress are not reduced to present
4 cash value.

5 Present cash value means the sum of money needed now, which, when
6 invested at a reasonable rate of return, will pay future damages at the times and in
7 the amounts that you find the damages that would have been received.

8 The rate of return to be applied in determining present cash value should be
9 the interest that can reasonably be expected from safe investments that can be made
10 by a person of ordinary prudence, who has ordinary financial experience and skill.
11 You should also consider decreases in the value of money that may be caused by
12 future inflation.

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28 Jury Instruction No. ____

NCJI 5.4

1 If you find for the plaintiff, you may, but are not required to, award punitive
2 damages. The purposes of punitive damages are to punish a defendant and to deter
3 similar acts in the future. Punitive damages may not be awarded to compensate a
4 plaintiff.

5 The plaintiff has the burden of proving by a preponderance of the evidence that
6 punitive damages should be awarded and, if so, the amount of any such damages.

7 You may award punitive damages only if you find that the defendant's conduct
8 that harmed the plaintiff was malicious, oppressive or in reckless disregard of the
9 plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is
10 for the purpose of injuring the plaintiff. Conduct is in reckless disregard of the plaintiff's
11 rights if, under the circumstances, it reflects complete indifference to the plaintiff's
12 safety or rights, or if the defendant acts in the face of a perceived risk that its actions
13 will violate the plaintiff's rights under federal law. An act or omission is oppressive if
14 the defendant injures or damages or otherwise violates the rights of the plaintiff with
15 unnecessary harshness or severity, such as by misusing or abusing authority or power
16 or by taking advantage of some weakness or disability or misfortune of the plaintiff.

17 If you find that punitive damages are appropriate, you must use reason in
18 setting the amount. Punitive damages, if any, should be in an amount sufficient to
19 fulfill their purposes but should not reflect bias, prejudice, or sympathy toward any
20 party. In considering the amount of any punitive damages, consider the degree of
21 reprehensibility of the defendant's conduct, including whether the conduct that
22 harmed the plaintiff was particularly reprehensible because it also caused actual harm
23 or posed a substantial risk of harm to people who are not parties to this case. You
24 may not, however, set the amount of any punitive damages in order to punish the
25 defendant for harm to anyone other than the plaintiff in this case.

26 In addition, you may consider the relationship of any award of punitive damages
27 to any actual harm inflicted on the plaintiff.

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1 Punitive damages may not be awarded against Churchill County. Punitive
2 damages may be awarded even if you award plaintiff only nominal, and not
3 compensatory, damages.

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1 In determining the amount of losses, if any, suffered by the plaintiff as a
2 proximate result of the defendant's tortious discharge of the plaintiff, you will take into
3 consideration three factors. Those factors are:

- 4 a. the nature;
5 b. the extent; and
6 c. the duration of the injuries or damages you believe, from the evidence,

7 Erwine has sustained.

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1 A verdict form has been prepared for you. [Explain verdict form as needed.]
2 After you have reached unanimous agreement on a verdict, your presiding juror
3 should complete the verdict form according to your deliberations, sign and date it, and
4 advise the clerk that you are ready to return to the courtroom.

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2 **DATED** this Thursday, February 10, 2022:

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By: /s/ Luke Busby, Esq.

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2 **CERTIFICATE OF SERVICE**
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4 Pursuant to FRCP 5, I certify that on the date shown below, I caused service to
5 be completed of a true and correct copy of the foregoing pleading by:

- 6 _____ personally delivering;
7 _____ delivery via Reno/Carson Messenger Service;
8 _____ sending via Federal Express (or other overnight delivery service);
9 _____ depositing for mailing in the U.S. mail, with sufficient postage affixed
10 thereto; or,
11 X delivery via electronic means (fax, eflex, NEF, etc.) to:

12
13 Katherine F. Parks, Esq.
14 Thorndal Armstrong
15 6590 S. McCarran Blvd. Suite B.
16 Reno, NV 89509
17 Attorney for the Defendant

18 **DATED** this Thursday, February 10, 2022

19 By: /s/ Luke Busby, Esq. _____
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